90-1 0291

In The

Supreme Court of the United States

October Term, 1990

EASTMAN KODAK COMPANY,

Petitioner,

vs.

IMAGE TECHNICAL SERVICES, INC., J-E-S-P CO., INC.; SHIELDS BUSINESS MACHINES, INC.; MICROGRAPHIC SERVICES, INC.; MICRO MAINTENANCE, INC.; ATLANTA GENERAL MICROFILM CO., INC.; ROGER KATONA, d/b/a G. & S. ELECTRONICS; AMTECH EQUIPMENT MAINTENANCE, INC.; ADVANCED SYSTEMS SERVICES, INC.; B.C.S. TECHNICAL SERVICES, INC.; BOB INGLE, INC.; DATA PROX EQUIPMENT CO.; FISHER MICROGRAPHICS, INC.; I.O.A. DATA CORP.; SEARLE ENTERPRISES, d/b/a MICRO IMAGE, INC.; MIDWEST MICROFILM EQUIPMENT & SERVICE, INC.; OMNI MICROGRAPHIC SERVICES, INC.; AND CPO, LTD.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DONN P. PICKETT
Counsel of Record
ALFRED C. PFEIFFER, Jr.
Three Embarcadero Center
San Francisco, California
Telephone: (415) 393-2000

McCUTCHEN, DOYLE, BROWN & ENERSEN
Of Counsel

Attorney for Petitioner Eastman Kodak Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Petitioner Eastman Kodak Company manufactures, markets and services business copiers and micrographics equipment. It concededly lacks market power in those highly competitive interbrand equipment markets. Respondents are 18 independent service organizations ("ISOs") which service Kodak equipment. Unilaterally Kodak chooses not to sell replacement parts to ISOs. Respondents refuse to develop their own available supply sources. They define single brand markets, limited to Kodak parts or service of Kodak equipment, and claim Kodak's practice is both a *per se* tying violation and unlawful monopolization. Judge Schwarzer granted summary judgment in favor of Kodak. The Ninth Circuit (Judge Wallace dissenting) reversed.

This petition presents the following questions:

1. Does a vertically-integrated equipment manufacturer that lacks market power in fiercely competitive interbrand equipment markets violate the Sherman Act by declining to sell replacement parts to ISOs?

2. Can respondents properly base their *per se* tying claim on the alleged tying of two single brand aftermarkets (tying Kodak service to Kodak parts) which are wholly derivative of a competitive interbrand market?

3. Does speculation about unspecified market imperfections constitute the "more persuasive evidence" required under *Matsushita* to defeat summary judgment in an economically implausible antitrust case?

QUESTIONS PRESENTED – continued

4. If a manufacturer has no interbrand market power and has legitimate business justifications for not selling parts to service competitors, can it monopolize a market limited to service of its own equipment or can its parts constitute an essential facility?

LIST OF PARTIES AND RULE 29.1 LIST

The caption of this petition identifies all parties in the lower court. Petitioner Eastman Kodak Company has no parent corporation. Kodak's subsidiaries, other than wholly owned subsidiaries, are listed below:

Actiphoto, LDA
Bellevue Photo S.A.R.L.
City Photo Limited
Consumer Developments Ltd.
Dainichiseika-Sterling Co., Ltd.
Ditram S.A.R.L.
India Photographic Company Limited
Inrock Chemical Co., Ltd.
K.K. Big Color Service
K.K. East West
K.K. Hiyama Photo Studio
K.K. IS Photo
K.K. Joy
K.K. Kyohai
K.K. Nihonbashi Pro Color
K.K. Qualte
K.K. Technicolor Angel
K.K. Tokyo Color Shizuoka Lab
K.K. Yokohama Lab
Kodak & H-Color De Forenende Fotolabortorier A/S
Kodak Imagica K.K.
Kodak Japan Ltd.
Kodak Korea Limited
Kodak Lab Chiba K.K.
Kodak Medical Ltd.
Les Laboratories Photographiques de France S.A.
LK-TEL Video S.A.
Mackwoods-Wintrop Ltd.
Miller Bros. Hall & Company Limited
Meubles Andes S.A.
Nippon System House Co., Ltd.

LIST OF PARTIES AND
RULE 29.1 LIST – continued

P.T. Sterling Products Indonesia
Photo Finishers (Glasgow) Limited
Quick Processing Industries (UK) Limited
Reflex Photo Works Limited
The Roll Film Company Limited
Sterling Drug Korea Ltd.
Sterling Drug (Malaya) Sdn. Bhd.
Sterling Farmaceutica Portuguesa Lda.
Sterling Products (Ghana) Ltd.
Sterling Products (Nigeria) Ltd.
Sterling Products Pakistan (Private) Ltd.
Sterling Yamanouchi Pharmaceutical Inc.
Taylors Developing & Printing Works Limited
Videoplex, Lda.
Y.K. Kamata Pro Photo
Yamagata Taigyo, Ltd.
Winster Pharmaceuticals Ltd.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 903 F.2d 612 (9th Cir. 1990). It is reprinted in the appendix

("App.") at 1A-28A. The district court's unpublished opinion and order granting Kodak's motion for summary judgment is reprinted at App. 29B-38B. The court of appeals' order denying Kodak's petition for rehearing is not reported and is reprinted at App. 39C-40C.

JURISDICTION

The court of appeals entered judgment on May 1, 1990. It denied a timely petition for rehearing on September 21, 1990. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes involved are 15 U.S.C. §§ 1 and 2. They are set out verbatim at App. 41D.

STATEMENT OF THE CASE

A. The Parties and the Market Setting

1. Kodak's place in the interbrand equipment markets

Kodak makes and sells complex business machines, specifically, photocopiers and micrographics equipment. It faces fierce competition in the interbrand markets for that equipment. Kodak's competitors are large American and Japanese corporations, including Xerox, Savin, Canon, Ricoh, and Minolta (as to copiers) and Bell & Howell, 3M, Canon and Minolta (as to micrographics). Respondents, and the court of appeals, concede that Kodak is not a monopolist and does not have market power in the interbrand copier and micrographics markets. App. 8A n.3.

Kodak's lack of market power extends to any alleged derivative aftermarkets for Kodak parts or service. It is

undisputed that, in making purchases, the sophisticated buyers of business copiers and micrographics equipment consider service and dependability as part of the total cost and value of a system. App. 20A. Thus, if Kodak charges supercompetitive prices for either parts or service, its total system will be too expensive and businesses will simply buy another manufacturer's machines.

Kodak's policy of providing the highest quality service for its machines is highly procompetitive. Service and dependability are vitally important to those who buy Kodak's machines. Kodak has emphasized the high quality and dependability of both its equipment and its supporting service organization. Kodak's efforts have succeeded: industry surveys have consistently rated Kodak's service the best and Kodak's equipment the most dependable. Understandably Kodak touts this service advantage to compete against other equipment suppliers.

Kodak's practice of not selling parts to ISOs is an essential part of that overall business strategy. Kodak's strategy has proved advantageous, both to it and its customers. It has enabled Kodak to provide customers with more choices where they really count – in the market for business machinery itself. Thus, Kodak's innovation and investment have led to its success and to greater choice in the interbrand markets.

2. Independent service organizations

In contrast to Kodak, respondents make nothing, offer no innovations, and have invested little, if anything. Respondents are 18 independent service organizations ("ISOs") located in ten different states. ISOs began offering service on Kodak equipment in 1982. They exist for the undisguised purpose of taking service customers and revenues away from Kodak. Yet they insist that Kodak must aid them in this effort by maintaining inventories

and selling them Kodak parts (defined as tools, test equipment, supplies and service manuals). There is no evidence that respondents could not obtain their own parts, either by making them or by cannibalizing used equipment.[1] Nor is there evidence of entry barriers to making parts; in fact, many competitors, including Kodak, have recently entered the far more complex equipment markets.

B. Kodak's Practices and the Reasons for Them

Kodak sells parts to its equipment owners if they use Kodak service or if they service equipment themselves. Kodak unilaterally chooses not to sell to ISOs.[2] There are three main reasons for these practices: (1) to promote interbrand equipment competition by allowing Kodak to stress its renowned service commitment; (2) to reduce Kodak's inventory costs by not stocking parts for ISOs; and (3) to prevent ISOs from freeriding on Kodak's investment in copier and micrographics equipment, parts and service.

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[1] In addition to those two sources, respondents can buy most Kodak parts directly from others. Respondents claim that 90% of all Kodak replacement parts are made outside Kodak. They concede that many parts can be bought from OEM's, but complain that in a few specific instances they cannot.

[2] Kodak established its parts practice for copiers at the time it entered that business in 1975. Kodak sold micrographics parts to anyone before it adopted a new program in 1985. It continues to sell ISOs parts for micrographics equipment introduced before 1985.

1. Promoting interbrand competition

In marketing its products, Kodak stresses its commitment to outstanding service. Indeed, the relationship of service to the underlying equipment offering was central to Kodak's decisions to adopt the challenged parts practices. Kodak determined that it could best maintain high quality service with direct quality control measures. Thus, it decided not to sponsor independent, and potentially inferior, service organizations by offering them parts. Maintaining outstanding service enhances Kodak's ability to compete with Xerox, Canon and the other manufacturers.

The parts practices also avoid damage to Kodak's relationship with its equipment customers. This happens in two ways. First, when an ISO has displaced Kodak, Kodak loses the day-to-day contact that is crucial to keeping its customer satisfied and learning of potential new sales opportunities. Even more important, divided responsibility inevitably leads to "finger-pointing" whenever an ISO cannot repair a problem. Kodak is blamed, even if the problem is the result of improper diagnosis, maintenance or repair. Kodak has no opportunity to respond; it may never even hear of the problem. But the customer's image of Kodak is tarnished and that hurts Kodak when the customer has future equipment needs. Kodak does not want to encourage even the possibility of that happening by fostering the efforts of ISOs.

2. Reducing inventories

A second reason for the parts practices is to reduce Kodak's parts inventories and thereby to reduce Kodak's costs. In early 1985, Kodak had over $16 million of micrographic equipment parts in stock. As a company-wide effort to improve its asset management, Kodak began looking for ways to reduce its parts inventory. One way

was to stop making, buying and stocking parts for the benefit of ISOs.

3. Not supporting freeriding

Respondents claim a right to freeride. That is, they want to hurt Kodak, by taking its service revenues, in direct reliance on Kodak's support, in selling them parts. Kodak does not want to support freeriding. Because Kodak must compete against the likes of Xerox, 3M, Bell and Howell and the ever increasing number of Japanese firms, it is challenge enough for Kodak to make an adequate return on its total investments in the copier and micrographics industries. As freeriders, respondents seek to force Kodak to help them divert Kodak's service revenues, an important part of the total return on those investments. Kodak should not be forced to harm itself by promoting the activities of freeriders such as respondents.

C. Course of Proceedings and Disposition Below

The district court for the Northern District of California, the Honorable William W. Schwarzer presiding, granted Kodak's motion for summary judgment on respondents' *per se* tying and monopolization claims.

The Ninth Circuit, in an opinion by the Honorable Charles E. Wiggins, with a dissent by the Honorable Clifford J. Wallace, reversed Judge Schwarzer's ruling. As to the *per se* tying claim, the majority acknowledged that Kodak does not have market power in the interbrand equipment markets. App. 8A n.3. The majority also conceded that interbrand competition "might prevent Kodak from possessing power in the [Kodak] parts market," that "equipment purchasers might turn to one of Kodak's competitors if Kodak ties supercompetitively priced service to parts," and that Kodak's "desire to attract new customers might, therefore, keep it from charging supercompetitive prices for service." App. 8A-9A.

Nonetheless, the majority dismissed Judge Schwarzer's ruling as resting on a "theoretical basis." App. 10A. It concluded that Kodak might have market power in the intrabrand parts market, despite respondents' concession that Kodak lacked interbrand power, because "market imperfections can keep economic theories about how consumers will act from mirroring reality." *Id.* Neither respondents nor the majority identified any market imperfections, and there is no evidence of imperfections. The majority held that respondents did not have to identify specific market imperfections or conduct "a market analysis," because "a requirement that they do so in order to withstand summary judgment would elevate theory over reality." *Id.* Accordingly, it allowed respondents' admittedly implausible claim and found a triable issue of fact existed as to whether Kodak had market power in a market limited to Kodak brand parts.

The majority also reversed Judge Schwarzer's grant of summary judgment as to respondents' section 2 monopolization claim. It found that the relevant market could be limited to the aftermarket for service of Kodak brand equipment and that Kodak might have monopoly power in that single-brand "market." App. 19A. Once again, the majority found "logical appeal" in Kodak's claim that it could not have monopoly power in any aftermarket because it lacked interbrand market power. *Id.* But the court deemed itself unable to "say that this theory mirrors reality," despite the absence of evidence to the contrary. *Id.* The majority then dismissed Kodak's undisputed evidence of the quality control business justification as conceivably "pretextual" and not "genuine." App. 18A.

Judge Wallace dissented. As to respondents' *per se* tying claim, Judge Wallace noted Kodak's inability to exert market power over parts in the face of vigorous interbrand competition:

> Applying Judge Posner's analysis in [*Parts and Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228 (7th Cir. 1988),] competition in the interbrand market dictates a simple choice: Kodak may either price parts competitively and maintain its interbrand market share, or it may price parts supercompetitively – yielding a short-term gain but over the long term destroying its share of the interbrand market. In either case, Kodak is not harming competition: if it adopts the latter strategy, competitive forces will exact a heavy toll in the interbrand market, and profits gained from the short-term parts mark-ups will quickly be eclipsed. The result would be "a brief perturbation in competitive conditions – not the sort of thing the antitrust laws do or should worry about." *Sterling*, 866 F.2d at 236 (Posner, J., dissenting).

App. 23A. As Judge Wallace succinctly noted, "the majority's holding is tenable only if power in the interbrand market is not relevant to power in the derivative market." App. 24A.

As to respondents' monopolization claim, Judge Wallace noted that Kodak had presented evidence of "its quality-of-service strategy" which was not contradicted by respondents and that "*[a]ny* business justification – whether or not it is the least restrictive – will defeat an attempt-to-monopolize claim." App. 26A, 27A. Thus, even if Kodak's practices were motivated in part by a desire to monopolize, Kodak's legitimate business justifications mandated summary judgment as to respondents' section 2 claims.

REASONS FOR GRANTING THE WRIT

Summary of Argument

This petition raises important issues of federal law: (1) whether a vertically-integrated equipment supplier, which has no interbrand market power, may nevertheless have market power over its own brand of parts, and (2) whether that supplier can monopolize a market limited to service of its own equipment despite undisputed evidence of a legitimate business justification. The court below held that Kodak's unilateral refusal to sell replacement parts to service competitors may give rise to a *per se* tying claim and a claim for monopolization. Its decision controverts this Court's decisions in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), other appellate decisions on point and the economic and competitive realities underlying the Sherman Act.

Respondents claim that Kodak improperly ties Kodak parts to Kodak service and monopolizes markets limited to service of Kodak brand copiers and micrographics equipment. But they concede, first, that Kodak lacks market power in the primary interbrand equipment markets and, second, that businesses buy Kodak equipment based on the total systems cost, including the cost of parts and service. Those concessions are fatal to their case.

Because Kodak lacks market power in the interbrand equipment markets, it cannot charge supercompetitive prices in the service or parts aftermarkets. If Kodak raised its parts or service prices above competitive levels, businesses would simply stop buying Kodak equipment. In short, due to fierce competition in the interbrand equipment markets, Kodak has no market power and no ability to act anticompetitively in any derivative parts or service aftermarket.

All three members of the Ninth Circuit panel accepted the logic of Kodak's position. But the majority held that something "short of actual market power" plus some unspecified "market imperfections" might create market power in a "market" limited to Kodak brand parts. App. 12A. The majority's speculation about unidentified market imperfections misapplies *Jefferson Parish's* requirement of actual market power in all tying cases. It also contradicts *Matsushita* which requires plaintiffs who bring implausible claims – ones that simply make no economic sense – to present "more persuasive evidence" to defeat summary judgment. Here, there is no evidence, let alone persuasive evidence, that Kodak has an ability to harm competition in any relevant market.

The majority had "more trouble" with respondents' monopolization claim, but again reversed summary judgment. App. 18A-19A. It concluded that Kodak might have *monopoly* power in a market for service of Kodak brand equipment. It rejected Kodak's undisputed evidence that its parts practices were at least in part justified by a high quality service strategy. It found that Kodak brand parts could be an "essential" facility, citing *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973) and *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585 (1985). The majority again misread this Court's decisions and extended the essential facility doctrine beyond recognition.

Resolution of the issues raised by the petition is critical to manufacturers in high technology industries. As equipment and its maintenance have become more sophisticated, manufacturers have placed various restrictions on the sale of their replacement parts to enhance high quality service and equipment dependability. Until now the law allowed unilateral refusals to sell parts to

independent service organizations. This is the first appellate decision to rule otherwise. But a dozen cases in eight Circuits are now considering virtually identical market definition and power issues, and the preliminary results are confusing and wildly inconsistent. Developers of high technology equipment need the certainty of law that only a decision of this Court can provide.

Prompt resolution of these issues is particularly urgent due to the chilling impact of the decision below on procompetitive innovation. Until now manufacturers have been free to market their systems with a variety of innovative approaches to the provision of parts and service. A manufacturer's ability to innovate, and to succeed in competitive interbrand markets, is enhanced by its freedom to develop parts and service strategies that improve its total systems offerings. The decision below threatens that freedom. If the decision is allowed to stand, potential innovators will have less incentive to develop equipment offerings for fear that their efforts to promote interbrand competition will subject them to treble damage actions at the hands of intrabrand competitors.

In an effort to cast their case as procompetitive, respondents ignore interbrand competition. They accuse Kodak of implausible conduct that at best impacts only single brand "markets" and that would be suicidal to Kodak's interbrand offerings. The real effect of the decision below is to help only respondents, not competition. Respondents simply want the unfettered right to buy parts from Kodak in order to siphon off service revenues from Kodak. They are unwilling (although not unable) to devote resources to develop repair parts or to compete with Kodak head on. If allowed to succeed, freeriding firms like respondents will inevitably discourage innovation and competition.

To correct the Ninth Circuit's serious legal errors in this area of vital importance to high technology industries, this Court should grant the petition and reverse the decision below.

I. The Court of Appeals' Decision Presents Significant Questions About the Application of the Antitrust Laws in Numerous High Technology Industries.

Until now the law uniformly protected, as unilateral refusals to deal, manufacturers' refusals to sell replacement parts so long as the interbrand equipment market was competitive. For example, in *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972), the Ninth Circuit affirmed summary judgment on section 1 and 2 claims against a plaintiff who wanted to obtain parts to service Stenocord dictating machines. It ruled that an antitrust claim would not lie unless the plaintiff could establish an interbrand equipment monopoly: in its words, "total market dominance – as distinguished from 'brand' monopoly." *Id.* at 120. *See also Nobel Scientific Industries, Inc. v. Beckman Instruments, Inc.*, 831 F.2d 537 (4th Cir. 1987), *aff'g and adopting* 670 F. Supp. 1313, 1321 (D. Md. 1986), *cert. denied*, 487 U.S. 1226 (1988); *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1478 (9th Cir. 1986), *modified*, 810 F.2d 1517 (1987); *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332, 1337-38 (9th Cir. 1983); *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 282 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979).

Recently, a rash of cases has reached the lower courts with new tying and monopolization claims. Each challenges a manufacturer's unilateral restriction on parts or some other derivative product. Each raises the same market power and market definition issues – specifically, whether interbrand competition permits market power over or a market definition limited to intrabrand parts or service.

This case is the first appellate decision to allow a single brand market definition. But it is only the first of many coming this way. There are a dozen other pending cases in the computer, medical equipment and printing equipment industries that involve identical issues. These cases, listed at App. 42E-43E, are scattered throughout the country in the First, Third, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits. As the following examples demonstrate, considerable confusion about these issues has arisen with completely inconsistent results:

- In this case, the district court entered summary judgment in favor of defendant, but the Ninth Circuit reversed, with one judge dissenting.
- In *HyPoint*, the district court entered a preliminary injunction against defendant, concluding that the plaintiff had raised serious questions on the merits. The Sixth Circuit vacated the preliminary injunction, stating that the record failed to reveal any serious question of an antitrust violation. Later, the district court refused even to consider defendant's summary judgment motion, and a jury entered a $1,500,000 verdict (after trebling) for plaintiff. Defendant's appeal is pending.
- In *Virtual Maintenance*, a jury entered a verdict of approximately $25,000,000 (after trebling) for plaintiff, while in *Datagate*, the district court entered summary judgment for defendant and in *Allen-Myland*, the district court entered judgment for defendant following a bench trial. Appeals in all three cases are pending.
- In *Service & Training*, the district court initially entered summary judgment for defendant on monopoly power grounds, but then

vacated that order. It later reinstated summary judgment on the plaintiff's tying claim, but not the monopolization claim.

Given this new period of confusion and uncertainty, businesses in high technology industries cannot make sound decisions about their service offerings or innovative equipment development. This Court's prompt intervention is required to confirm the freedom to select marketing strategies in competitive equipment markets and set the law straight in this important area.

II. The Court of Appeals' Decision on Respondents' *Per Se* Tying Claim Conflicts with This Court's Decisions In *Jefferson Parish* and *Matsushita* and Is Contrary to Economic Logic and Antitrust Policy.

The decision below is contrary to this Court's rulings in *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1986) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) and other decisions in the First, Sixth and Ninth Circuits. It relies on improper single brand markets and makes no economic or antitrust sense.

A. The Decision Below Conflicts With This Court's Decision in *Jefferson Parish*.

The decision below rests on the proposition that a manufacturer can be liable for treble damages despite a conceded lack of market power in any market other than alleged aftermarkets for parts and service of its own brand of equipment. This single-brand "aftermarket power" theory is contrary to a long line of authority, reaffirmed by this Court in *Jefferson Parish*, holding that there can be no tying violation in the absence of actual market power.

The decision's conflict with *Jefferson Parish* is clear. The majority in *Jefferson Parish* resolved the debate with

those who would overturn *per se* tying entirely[3] by requiring actual market power: "we have condemned tying arrangements when the seller has some special ability – usually called 'market power' – to force a purchaser to do something that he would not do in a competitive market." 466 U.S. at 13-14. The market power requirement is not an empty one. As Judge Posner and Judge Wallace have noted, without market power, supercompetitive pricing of derivative products is necessarily a short-term, Pyrrhic strategy. As Judge Wallace put it:

> I do not see how Kodak could have any market power in the market for replacement parts. If Kodak attempts to increase the price of replacement parts above the competitive level, new buyers will increase their estimates of the total price (including parts and service) of a Kodak copier. If some current Kodak owners are unwilling to scrap their copiers and buy new ones from other manufacturers, Kodak will gain short-run profits from the sale of parts. However, as new buyers switch brands, Kodak will lose market share in the sales of new copiers, to its long-term disadvantage.

App. 20A-21A.

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[3] *Jefferson Parish* is this Court's most recent treatment of tying claims. Although the Court divided 5-4 over whether tying is unlawful *per se*, all Justices agreed that the hospital's restriction of available anesthesiologists was lawful. *Per se* treatment reflects a conviction that the suspect practice is so likely to result in anticompetitive effects that the parties and the court need not engage in lengthy market analysis. *Per se* analysis is particularly inappropriate here. In fact, this Court has twice refused to extend *per se* illegality to certain vertical restraints at least in part due to its conclusion that "interbrand competition . . . provides a significant check on the exploitation of intrabrand market power. . . . " *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n. 19 (1977). *Accord Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 725 (1988).

The majority did not dispute this logic. Instead, just as the Fifth Circuit had done in *Jefferson Parish*,[4] it simply stated that normal economic reasoning should not apply. Purporting to rely on *Jefferson Parish*, it determined that "[s]ome strength . . . short of actual market power . . . combin[ed] with other factors" was sufficient. App. 12A. Specifically, it held that a market share of not more than 23% plus unspecified, speculative market imperfections created a triable issue as to market power. *Id.*

The majority's analysis turns *Jefferson Parish* on its head. *Jefferson Parish* held that evidence of specific, verified market imperfections in a unique market, combined with a 30% market share in the tying product, was insufficient to create market power. "While these factors may generate 'market power' in some abstract sense, they do not generate the kind of market power that justifies condemnation of tying." 466 U.S. at 27. Thus, speculative inferences about unidentified market imperfections, even in combination with significant market share, cannot be enough to support a *per se* tying claim.

The majority's "market imperfections" analysis was based on the Ninth Circuit's own questionable decision in *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1342 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985). The decision below, combined with *Digidyne*, exacerbates the Ninth Circuit's conflict with *Jefferson Parish*.

To find a substitute for actual market power, the majority relied on *Digidyne* and held that Kodak may enjoy market power because its existing customers were allegedly "locked-in" to Kodak brand products. App. 11A ("some owners of large Kodak equipment packages will pay higher prices for Kodak service rather than switch to competitors' systems"). Prior to this case, *Digidyne* stood alone in supporting such a "lock-in" theory of market power. The lock-in theory has been repeatedly rejected by other courts, and is contrary to antitrust and economic logic.[5] It does not and cannot eliminate the impact of Kodak's lack of interbrand market power. In the long run, Kodak must attract new equipment purchasers and therefore must price parts and service competitively.

[4] *Compare Hyde v. Jefferson Parish Hospital District No. 2*, 686 F.2d 286, 290 (5th Cir. 1982), which this Court overruled, *with* App. 10A.

Digidyne has been expressly rejected by several courts. *See. e.g., A.I. Root Co. v, Computer/Dynamics, Inc.*, 806 F.2d 673, 676 (6th Cir. 1986); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 n.4 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986). Another panel of the Ninth Circuit criticized and narrowly interpreted *Digidyne* in *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342, 1346 n.4 (9th Cir. 1987). Moreover, Justices White and Blackmun of this Court would have granted certiorari in *Digidyne* to address, among other issues, "what constitutes forcing power in the absence of a large share of the general market" and "whether market power over 'locked in' customers must be analyzed at the outset of the original decision to purchase." *Data General Corp. v. Digidyne Corp.*, 473 U.S. 908 (1985) (White, J. and Blackmun, J., dissenting from denial of certiorari).

[5] *See, e.g., General Business Systems v. North American Philips Corp.*, 699 F.2d 965, 975 (9th Cir. 1983); *Kaplan v. Burroughs Corp.*, 611 F.2d 286 293-95 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980); *Telex Corp. v. IBM Corp.*, 510 F.2d 894, 917 (10th Cir.), *cert. dism'd*, 423 U.S. 802 (1975). As the United States argued, in an *amicus curiae* brief urging the Court to grant certiorari in *Digidyne*, the lock-in theory improperly focuses only on a customer's post-purchase alternatives. Brief for the United States as *Amicus Curaie* at 14-17, *Data General Corp. v. Digidyne Corp.*, No. 84-761 (May 1985).

Digidyne should not be extended. This case presents the Court with a significant opportunity to preserve the market power requirement of *Jefferson Parish* and prevent the stifling effects of the Ninth Circuit's expansive "market imperfections/lock-in" theory.

B. The Decision Below Conflicts with Other Decisions of the First, Sixth and Ninth Circuits.

The decision below is the first to reject the logic that interbrand competition necessarily precludes market power in derivative aftermarkets. The decision conflicts with decisions of the First and Sixth Circuits and even with prior Ninth Circuit authority.

The First Circuit held in *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 797 (lst Cir. 1988) (Breyer, J.) that an automobile manufacturer's lack of interbrand market power mandated a finding that the manufacturer had no market power over spare parts for its automobiles. Likewise, the Sixth Circuit, in *A.I. Root Co.*, 806 F.2d at 675, held that a computer hardware supplier's lack of interbrand market power precluded any market power over an alleged derivative market for software for its computers.[6] *See also Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 234-37 (7th Cir. 1988) (Posner, J., dissenting), *cert. denied*, 110 S. Ct. 141 (1989).

The decision below also conflicts directly with the Ninth Circuit's own decision in *General Business Systems v. North American Philips Corp.*, 699 F.2d 965 (9th Cir.

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[6] Many other courts have reached the same result by rejecting proposed submarkets limited to a single-brand product or its components. *See, e.g., Kenworth of Boston, Inc. v. Paccar Financial Corp.*, 735 F.2d 622, 623-24 (lst Cir. 1984); *Kingsport Motors, Inc. v. Chrysler Motors Corp.*, 644 F.2d 566, 571 (6th Cir. 1981); *Mozart*, 833 F.2d at 1346-47.

1983). There, the Ninth Circuit found that, as a matter of law, interbrand equipment competition precluded the exercise of market power in an alleged derivative aftermarket for Philips magnetic ledger cards ("mlcs"). The court rejected the notion

> that a manufacturer, facing competition against which it cannot prevail in the sale of its end product, could be found to monopolize the market for each unique component that goes into the product. This is surely to lose sight of the forest because of fascination with the trees.

699 F.2d at 975. It concluded that the derivative aftermarket "cannot be separated from the general market" for Philips' equipment. *Id.* at 972. The Ninth Circuit's reasoning presaged that later espoused by Judges Wallace and Posner:

> Philips had little or no power to raise the price of its mlcs without reducing its profits because any such increase would diminish sales of its computer system and very likely adversely affect aggregate profits.

699 F.2d at 972.

The majority's attempt to distinguish these cases fails. It relied on the fact that in cases such as *Grappone*, the tying product was equipment, rather than replacement parts:

> In those cases, since equipment was the tying product, inter-brand competition in the equipment market readily negated the plaintiffs' claims that the defendants possessed power in the tying product market.

App. 8A-9A. That fact does not distinguish this case. Kodak has no more market power over its parts or service than Subaru or Mercedes-Benz (*see Mozart*, 833 F.2d at 1346-47) had over their parts. It makes no sense to acknowledge that interbrand competition affects one aftermarket, but not another.

Although it tried three different ways, the majority also failed to distinguish *General Business Systems*. First, it noted that the plaintiff there "had 'not presented facts from which [market power] could be inferred.' " App. 11A. But that is no distinction, because it is undisputed that Kodak does not have interbrand market power. Second, the majority alluded to evidence that "many Kodak parts . . . are unique." *Id.* But Philips' mlcs were unique: they were manufactured using Philips' "trade secrets and confidential specifications" and bore a legend proscribing their reproduction. *See MLC, Inc., v. North American Philips Corp.*, 1983-1 Trade Cases (CCH) ¶65,351, pp. 70,090, 70,098 n.22 (S.D.N.Y. 1983). Moreover, respondents had no evidence as to which, if any, Kodak parts were unique, no explanation as to whether the unlawfulness of the alleged tie is limited to unique parts, and no rationale for penalizing the special innovation represented by unique parts. Third, the majority improperly relied on the irrelevant fact that Kodak's share of the interbrand markets "may approach as much as twenty-three percent." App. 12A. As Judge Wallace noted, Kodak's market share is irrelevant since it has no interbrand market power. App. 24A. That distinction also runs afoul of *Jefferson Parish*, where this Court determined that a 30% market share, even combined with actual market imperfections, did not suffice to create market power.

C. The Decision Below Conflicts with this Court's Decision in *Matsushita*.

The decision below fundamentally undercuts the role of summary judgment in antitrust law. The majority ignored the underlying purposes of the antitrust laws and sidestepped this Court's ruling in *Matsushita*. There this Court held that, considering the record as a whole,

"if the factual context renders [plaintiffs'] claim implausible – if the claim is one that simply makes no economic sense – [plaintiffs] must come forward with more persuasive evidence than would otherwise be necessary." 475 U.S. at 587. Specifically, *Matsushita* rejected an expert's opinion that the alleged conspirators had depressed prices and sold goods at substantial losses. *Id.* at 594 n. 19, 600-03. The Court found that the expert's evidence of below-cost pricing had "little probative value in comparison with the economic factors . . . that suggest that such conduct is irrational." *Id.* at 594 n. 19. In short, evidence that might otherwise permit a plaintiff to survive summary judgment will not save a plaintiff whose claims make no economic sense.

The majority ignored the *Matsushita* rule. It acknowledged that undisputed interbrand competition "might prevent Kodak from possessing power in the parts market," since equipment purchasers might not tolerate supercompetitive service pricing. App. 8A. This economic reality is unassailable. Respondents said nothing to contradict it. Nonetheless, the majority rejected it based on its speculation that market imperfections *might* exist to prevent theory from matching reality. Yet it never discussed any such imperfections and specifically excused respondents' failure to conduct a market analysis or identify specific imperfections. App. 10A.

In lieu of any market analysis, the majority substituted evidence of price differentials and price competition between Kodak and ISOs in the alleged service aftermarket.[7] That evidence does not refute in any way the overriding effect of interbrand competition. As Judge Wallace noted, the cited evidence is entirely consistent

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[7] The majority also relied on evidence of a "lock-in" as to prior purchasers. See pp. 16-17 above.

with the concept that Kodak can charge supercompetitive prices only in the suicidal short run and at risk of quickly losing its position in the far more important interbrand equipment market. App. 23A. In fact, all that evidence shows is that freeriding ISOs who do not bear the costs of establishing supply sources and maintaining parts inventories may be able to outbid those, like Kodak, who do make those investments. In no event can that evidence overcome the economic implausibility that lies at the heart of respondents' case.[8]

Thus, the majority's opinion elevates unsupported speculation over economic reality. Its reasoning is contrary to this Court's ruling that, to avoid summary

[8] The majority suggests that respondents were not provided a sufficient opportunity to discover market power evidence. App. 10A. But complete document discovery and numerous depositions and interrogatories were allowed on that subject. Moreover, Judge Schwarzer granted respondents' initial request for additional discovery. Later, when ordered by Judge Schwarzer to identify any additional needs, respondents failed to identify the nature or subject matter of any further discovery. App. 37B-38B. Respondents' only specific discovery complaint was that two customers refused to sign declarations, one relating to their "lock-in" theory and the other to price competition on a public agency bid for a service contract. Including those declarations, the respondents' evidence was limited to (1) facts about Kodak's intent, (2) statements from respondents and one owner of Kodak equipment who believed there is a "lock-in" once equipment is bought and (3) statements that Kodak believed its superior service could command a premium and that at least once Kodak offered to lower prices in response to ISO competition. App. 10A-11A. None of this evidence is relevant to any unspecified market imperfections or to the conceded fact that interbrand competition controls the pricing of parts and service. Respondents were not denied an opportunity to develop a market analysis or pinpoint market imperfections.

judgment, a plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. It eviscerates the requirement that a plaintiff come forward with "more persuasive evidence" when, as here, a claim makes no economic sense. Indeed, the majority held that respondents need come forward with no market analysis evidence at all, even when their claims are contrary to sound, indeed admitted, economic logic.

The ruling below plainly conflicts with other cases that have applied *Matsushita*. Other appellate courts have not hesitated to require plaintiffs making implausible claims to come forward with "more persuasive evidence" to avoid summary judgment. For example, in *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987), Justice, then-Judge, Kennedy wrote that:

> Where a party asserts there is a genuine issue for trial . . . its argument is measured by the underlying theory of the claim or defense being considered. . . . [T]he substantive law is the law of antitrust, and if the claim makes no economic sense, a speculative inference from the jury will not help it. In such an instance, the record on summary judgment must contain further persuasive evidence if it is to support the claim.

Accord Eichman v. Fotomat Corp., 880 F.2d 149, 161 (9th Cir. 1989). *See also Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago*, 877 F.2d 1333, 1338-40 (7th Cir. 1989) (Easterbrook, J.); *Argus, Inc. v. Eastman Kodak Co.*, 801 F.2d 38, 45 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987).

Matsushita means what it says. Summary judgment should be granted in cases where plaintiffs assert claims that make no antitrust or economic sense and that are not supported by persuasive evidence.

III. The Court of Appeals' Decision on Respondents' Monopolization Claim Conflicts with Other Court of Appeals' Decisions and Improperly Extends the Essential Facilities Doctrine.

The majority began its analysis of respondents' Section 2 claim by acknowledging the "general rule" that even a monopolist has "no duty to deal with its competitors." App. 16A. It held, however, that Kodak might fall within an exception to that rule, because (a) "[a] monopolist may not refuse to deal with a competitor in an exclusionary attempt to impede competition without a legitimate business reason," and (b) "a monopolist may not retaliate against a customer who is also a competitor by denying him access to a facility essential to his operations, absent legitimate business justifications."[9] App. 16A-17A. This holding is wrong for at least three independent reasons: (1) Kodak is not a monopolist in any relevant market; (2) Kodak presented unrefuted evidence of legitimate business justifications for its practices; and (3) replacement parts cannot be an essential facility. We address these points in turn.

1. The majority's assumption that Kodak has monopoly power is baseless. The majority conceded that monopoly power under section 2 "is something more than the market power that is a prerequisite to liability under section 1."[10] App. 19A. But as shown above, Kodak

[9] As the majority conceded, respondents did not raise any of these arguments in the district court. App. 16A n.7. But the majority nonetheless proceeded to decide them based on its reasoning that the district court might somehow have considered these issues anyway. *Id.* That decision was improper. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

[10] The majority conceded that it had "more trouble" with the question of monopoly power, which "is not as easily

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does not even possess market power in any relevant market. By definition, it cannot possess monopoly power.

The majority attempted to avoid this problem by choosing an unreasonably narrow relevant market, limited to the service of Kodak-brand equipment. *Id.* That market definition is wrong.[11] Numerous other Circuit court decisions have rejected similar proposed submarkets limited to the service or components of a single-brand product. *See, e.g., General Business Systems*, 699 F.2d at 975; *Mozart*, 833 F.2d at 1346-47; *Kenworth of Boston, Inc. v. Paccar Financial Corp.*, 735 F.2d 622, 623-24 (lst Cir. 1984); *Kingsport Motors, Inc. v. Chrysler Motors Corp.*, 644 F.2d 566, 571 (6th Cir. 1981); *Telex Corp. v. IBM Corp.*, 510 F.2d 894, 919 (10th Cir.), *cert. dism'd*, 423 U.S. 802 (1975).[12]

(Continued from previous page)

answered" as the question of market power. App. 18A-19A. But without any further evidence, much less further analysis, the majority simply assumed its own answer and concluded that a triable issue exists as to monopoly power. App. 19A.

[11] It is also unsupported. The majority relied solely on *Dimidowich* to reach its conclusion that a single-brand aftermarket can be a section 2 relevant market. App. 18A. The majority misread *Dimidowich*. The Ninth Circuit there separated service from the product itself merely to determine whether two businesses were competitors, which would make their concerted refusal to deal with plaintiffs a horizontal restraint. 803 F.2d at 1480 n.3. The court did not undertake a market analysis in *Dimidowich*.

[12] *See also* Bork, *The Antitrust Paradox* 370-71 (1978) ("Any product or service can be broken down into smaller components, and the seller who refuses to do so is insisting upon tying the components together. . . . The reason for not calling these arrangements tie-ins is that requiring the seller to deal in smaller quantities (and there is no limit to the smallness of the

(Continued on following page)

The flaw in the majority's reasoning is clear – its narrowly defined market completely ignores the impact of interbrand competition.

2. As Judge Wallace noted in dissent, "Kodak's policies cannot give rise to section 2 liability if they have a legitimate business justification." App. 25A. That is true even if Kodak somehow had monopoly power in a relevant market. *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 368 (9th Cir.). *cert. denied*, 488 U.S. 870 (1988) (a monopolist's duties under section 2 "arise only when there is no justification for refusing to aid a competitor.") Kodak's evidence of its legitimate business justification – "a marketing strategy based on high-quality service" – was undisputed. App. 25A.[13] Thus, independent of the monopoly power analysis, summary judgment on the section 2 claim was required.

Previous decisions of the Ninth Circuit have held that a quality control justification is sufficient to preclude Section 2 liability. *See, e.g., Mozart*, 833 F.2d at 1350-51, 1352; *Drinkwine v. Federated Publications, Inc.*, 780 F.2d 735, 740 (9th Cir.). *cert. denied*, 475 U.S. 1087 (1986). Nonetheless, the majority found that Kodak's business justifications might be "pretextual" and not "genuine," because

(Continued from previous page)

quantity one could demand) would introduce obvious diseconomies. It would be inefficient and, therefore, anticonsumer").

[13] That business justification and two others are discussed at pp. 4-6, above. As the majority recognized, respondents had the burden of showing a lack of justification on a Section 2 claim. App. 17A n.9. Specifically, in responding to the motion for summary judgment, respondents had to come forward with "significant probative evidence" to show Kodak's lack of justification. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

"a reasonable trier of fact could find that Kodak's implementation of its policies . . . involved a specific intent to monopolize." App. 17A-18A. But as Judge Wallace noted, it does not matter whether or not Kodak may have had some monopolistic motivations, because it undisputedly had a legitimate business justification:

> "[T]he desire to maintain market power – even a monopolist's market power – cannot create antitrust liability if there was a legitimate business justification for [the challenged action]." *Oahu Gas*, 838 F.2d at 368-69.

App. 27A. Indeed, prior decisions of the First, Fifth and Seventh Circuits have held that a legitimate business justification defeats Section 2 liability, even if there is evidence of anticompetitive intent. *See Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1109-13 (lst Cir. 1989), *cert. denied*, 110 S. Ct. 473 (1990); *Bell v. Dow Chem. Co.*, 847 F.2d 1179, 1186 (5th Cir. 1988); *Olympia Equip. Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370, 376 (7th Cir. 1986). The majority's focus on whether subjectively Kodak was motivated by anticompetitive intent and whether Kodak's business justification was "genuine" misses the point. Most lawful, procompetitive business practices are by definition designed to take business from competitors. To make motivation the test of liability would inevitably chill those lawful practices. Thus, it has "become an antitrust commonplace . . . that if conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors . . . is irrelevant." *Olympia*, 797 F.2d at 379. *See also* III P. Areeda & D. Turner, *Antitrust Law* ¶626 at 76 (1978).

3. The decision below establishes that a single manufacturer's brand-name replacement parts may constitute an "essential facility" that it must share with its

competitors. That result is an unprecedented and unsupported extension of the essential facility doctrine.

The majority's essential facility conclusion relies, without analysis, on this Court's decision in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973). App. 17A. The majority's lack of elaboration is understandable and revealing. *Otter Tail* does not and cannot support the majority's expansive reading of it. As Professor Areeda has noted, *Otter Tail* makes sense only in light of its peculiar facts:

> Far from establishing any general duty to deal, however, *Otter Tail* is very limited. Not only was the defendant a natural monopolist, it was regulated and its activities may have evaded that regulation, to the prejudice of consumers.

Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," 58 *Antitrust L.J.* 841, 848 (1990). By contrast, Kodak is not a monopolist, other than in the sense that any manufacturer is a legal monopolist as to its own brand name. Further, Kodak is not a participant in a regulated industry; it faces fierce competition in unregulated interbrand markets. In short, *Otter Tail* has nothing to do with this case. The majority's extension of *Otter Tail* presents an opportunity for this Court to limit any expansion of the essential facilities doctrine.

The majority's reliance on *Aspen Skiinq Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) is similarly misplaced. App. 16A. In *Aspen*, this Court expressly declined to consider the merits of the plaintiff's essential facilities claim. 472 U.S. at 611 n.44. In any event, *Aspen* must be limited to its unique facts. There, the defendant was a conceded monopolist, 472 U.S. at 596, and the Court found that the defendant had "fail[ed] to offer any efficiency justification whatever" for its unwillingness to continue its prior cooperation with the plaintiff. 472 U.S. at 608. Indeed, because the cooperation agreement had

originated in a competitive market and persisted for sixteen years, this Court found that cooperation may have been the "optimal" pattern of distribution. 472 U.S. at 604-07 and n.31. By contrast, Kodak is not a monopolist, its quality control business justification was undisputed, and its parts distribution practices are not ingrained by long-standing market forces.

The "essential facilities" doctrine should not be extended to encompass a single manufacturer's brand-name parts. The majority's expansion of the essential facilities doctrine conflicts with the decisions of other appellate courts, which have narrowly construed it. The Seventh Circuit, in *Olympia*, 797 F.2d at 376, held that a monopolist could lawfully extend help to new entrants and later withdraw that support. Similarly, in *Oahu Gas*, the Ninth Circuit held that even monopolists have a duty to assist competitors *only* when there is no business justification for the refusal. 838 F.2d at 368. *See also Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566 (2d Cir. 1990).

The majority's decision on respondents' Section 2 claim reaches far beyond *Otter Tail* and *Aspen*. Its misapplication of the essential facilities doctrine presents a clear opportunity for the Court to define the limits of that doctrine.

IV. The Court of Appeals' Decision Hinders Innovation and Frustrates Competition

At bottom, Kodak's practices do not violate the antitrust laws because they cannot harm competition. To the contrary, Kodak's practices are dictated by and promote interbrand competition. Kodak's innovative equipment developments, which are the sole basis for respondents' existence, have given consumers greater and better choices in micrographics equipment and high volume

copiers. Kodak's ability and desire to develop new equipment is enhanced by its freedom to select parts and service strategies that it believes will support those offerings. The law requires nothing more – a company that innovates and creates a new product is not compelled to surrender the fruits of that innovation, whether it is a new copier or a new camera. *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

Every manufacturer of sophisticated business equipment faces the same situation as Kodak. As it decides whether or not to devote resources to innovative equipment, the manufacturer must consider its freedom to develop marketing plans, including high quality service strategies designed to improve equipment dependability. Under the majority's ruling, that innovation will be discouraged. Under Judge Schwarzer's summary judgment and Judge Wallace's dissent, innovation and competition are allowed to work.

CONCLUSION

Kodak's petition for a writ of certiorari should be granted.

Respectfully submitted,

DONN P. PICKETT
ALFRED C. PFEIFFER
MCCUTCHEN, DOYLE, BROWN &
ENERSEN
Three Embarcadero Center
San Francisco, California 94111
(415) 393-2000

*Attorney for Petitioner
Eastman Kodak Company*

Dated: December 20, 1990

APPENDIX

IMAGE TECHNICAL SERVICE, INC., a California corporation; J-E-S-P Company, Inc., a New Jersey corporation; Shields Business Machines, Inc., a Pennsylvania corporation; Micrographic Services, Inc., a Missouri corporation; Micro Maintenance, Inc., an Illinois corporation; Atlanta General Microfilm Co., Inc., a Georgia corporation; Roger Katona, doing business as G. & S. Electronics; Amtech Equipment Maintenance, Inc., a Minnesota corporation; Advanced Systems Services, Inc., a Colorado corporation; B.C.S. Technical Services, Inc., a Colorado corporation; Bob Ingle, Inc., a Missouri corporation; Data Prox Equipment Co., a New Jersey corporation; Fisher Micrographics, Inc., a Missouri corporation; I.O.A. Data Corp., a New York corporation; Searle Enterprises, doing business as Micro Image, Inc.; Midwest Microfilm Equipment & Service, Inc., a Minnesota corporation; Omin [sic] Micrographic Services, Inc.; and CPO, Ltd., a California corporation, Plaintiffs-Appellants,

v.

EASTMAN KODAK CO., a New Jersey corporation, Defendant-Appellee.

No. 88-2686.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 10, 1989.

Decided May 1, 1990.

James A. Hennefer, Law Offices of James A. Hennefer, San Francisco, Cal., for plaintiffs-appellants.

Donn P. Pickett, McCutchen, Doyle, Brown & Enersen, San Francisco, Cal., for defendant-appellee.

Appeal from the United States District Court for the Northern District of California.

Before CHAMBERS, WALLACE and WIGGINS, Circuit Judges.

WIGGINS, Circuit Judge:

Appellants are independent service organizations, or ISOs, that service copier and micrographic equipment manufactured by appellee Eastman Kodak Co. They appeal summary judgment dismissing their antitrust claims against Kodak. We reverse and remand.

At the heart of this case are two of Kodak's business policies: First, Kodak will not sell replacement parts for its equipment to Kodak equipment owners unless they agree not to use ISOs. Second, Kodak will not knowingly sell replacement parts to ISOs. Kodak admits that the purpose of these policies is to prevent ISOs from competing with Kodak's own service organization for the repair of Kodak equipment.

On appeal, appellants argue that they raised triable issues concerning: (1) whether Kodak's refusal to sell parts to equipment owners unless they agree not to use ISOs constitutes a tying arrangement violative of Section 1 of the Sherman Act; and (2) whether Kodak's refusal to sell parts to ISOs is an act of monopolization violative of Section 2 of the Sherman Act.

We have jurisdiction under 28 U.S.C. § 1291 (1982). We review the district court's grant of summary judgment de novo. *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987). We must determine, viewing the evidence in the light most favorable to appellants,

whether issues of material fact exist and whether the district court correctly applied the relevant substantive law. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986).

Viewed in the light most favorable to appellants, the facts are as follows: Prior to 1982, Kodak serviced almost all of its micrographic and copier equipment. Kodak would sell replacement parts (at a profit) to any party who intended to use them to repair Kodak equipment. ISOs generally do not manufacture the replacement parts they use in providing equipment service. ISOs do, however, maintain regular inventories of such parts. In reliance on Kodak's practice of freely selling replacement parts, ISOs developed and began to compete significantly with Kodak in 1984 and 1985. ISOs offered service for as little as half of Kodak's price. To better compete, Kodak in some cases cut its price for service. Some customers found ISO service superior to Kodak service.

Concerned with ISO competition, Kodak reviewed its replacement parts policies in 1985 and developed its current policies of not selling replacement parts to ISOs or to customers who use ISOs. Kodak exempted micrographic equipment manufactured before 1985 from these new policies. Since 1985, Kodak has had difficulty identifying ISOs and customers who use ISOs. Kodak, therefore, unknowingly sold parts to ISOs and customers who use them since it implemented the 1985 policies. Kodak is currently attempting to enforce more effectively its policies.

I. *The Tying Claim*

Section 1 of the Sherman Act declares illegal "[e]very contract, combination . . . , or conspiracy, in restraint of

trade or commerce." 15 U.S.C. § 1 (1982). The Supreme Court has consistently interpreted this provision to prohibit only unreasonable restraints of trade. *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 108 S.Ct. 1515, 1519, 99 L.Ed.2d 808 (1988). Appellants contend that they have presented genuine issues for trial as to whether Kodak's refusal to sell spare parts to equipment owners unless they agree not to use ISOs constitutes a tying arrangement *per se* unreasonable under this section.[1]

A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, *or at least agrees that he will not purchase that product from any other supplier.*" *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958) (emphasis added, footnote omitted). A tying arrangement is *per se* unreasonable if the defendant has sufficient economic power in the tying product market to restrain competition appreciably in the tied product market and if the arrangement affects more than an insubstantial volume of interstate commerce in the tied product.[2] *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 499, 89 S.Ct.

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[1] Appellants briefly argue that Kodak's conduct is illegal under a rule of reason analysis. We do not consider this argument because appellants failed to raise it in response to Kodak's motion for summary judgment in the district court. *See Animal Protection Institute of America v. Hodel*, 860 F.2d 920, 927 (9th Cir. 1988) (failure to raise issue below bars consideration on appeal).

[2] Kodak does not dispute that its arrangement affects a substantial volume of interstate commerce in the tied product.

1252, 1256, 22 L.Ed.2d 495 (1969); *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1345 (9th Cir. 1987), *cert. denied*, ___ U.S. ___, 109 S.Ct. 179, 102 L.Ed.2d 148 (1988); *General Business Systems v. North American Philips Corp.*, 699 F.2d 965, 977 (9th Cir. 1983).

The district court held that appellants failed to show evidence of a tying arrangement, noting that Kodak does not "condition the sale of one product on the buyer's purchase of another product" since a "Kodak customer can buy equipment without having to buy parts; and he can buy parts if he simply owns Kodak equipment." *Image Technical Services, Inc. v. Eastman Kodak Co.*, No. C-87-1686-WWS, at 5, 1988 WL 156332 (N.D.Cal.Apr. 18, 1988) (Memorandum of Opinion and Order Granting Summary Judgment). Appellants argue that the district court misconstrued one of their theories, explicitly presented in their memorandum in opposition to Kodak's motion for summary judgment. This theory is that Kodak has tied parts to service, not equipment to parts or parts to equipment.

Kodak responds that even viewed as appellants suggest, its policy is not a tying arrangement. First, Kodak points out, it does not force owners to buy service in order to receive parts; Kodak only requires owners not to buy ISO service to receive parts. Kodak will sell parts to owners who agree to self-service their machines. Kodak, however, misconceives the nature of tying agreements. As we stated above, a tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, *or at least agrees that he will not purchase that*

product from any other supplier." *Northern*, 356 U.S. at 5-6, 78 S.Ct. at 518 (emphasis added; footnote omitted).

Second, Kodak argues that its policy is not a tying arrangement because parts and service form a single product market, and without two distinct markets there can be no tying arrangement. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 21, 104 S.Ct. 1551, 1562, 80 L.Ed.2d 2 (1984). The critical question in determining whether two distinct product markets exist is whether it is economically efficient to offer two products separately. *Id.* at 21-22, 104 S.Ct. at 1562-63. That, in turn, depends on whether the demand for each can be separated. *Id.* Kodak contends that there is no separate demand for parts and service. Indeed, Kodak contends, they are useless without each other. Consequently they are economically inseparable.

Kodak's argument presents, at best, a disputed issue of fact. That products must be used together does not eliminate the possibility that they form distinct markets. "We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices." *Id.* at 19 n. 30, 104 S.Ct. at 1562 n. 30 (citing cases). Kodak's policy of allowing customers to purchase parts on condition that they agree to service their own machines suggests that the demand for parts can be separated from the demand for service. Kodak does not dispute appellants' claim that some equipment owners have (perhaps surreptitiously) bought service from ISOs and parts from Kodak. Nor does Kodak dispute appellants claim that other equipment owners would have contracted with

ISOs for service if they could have obtained parts separately. *Cf. Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1480 n. 3 (9th Cir. 1986) (applying California law) (noting that for some products, such as automobiles, the parts market is distinct from the service market), *modified* 810 F.2d 1517 (9th Cir. 1987); *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1339 (9th Cir. 1984), *cert. denied*, 473 U.S. 908, 105 S.Ct. 3534, 87 L.Ed.2d 657 (1985) (holding that separate markets existed for computer central processing unit and computer operating system).

Having established that a tying arrangement might exist, we next consider whether, assuming that such a tying arrangement exists, there is an issue of material fact as to whether Kodak has sufficient economic power in the tying product market to restrain competition appreciably in the tied product market. To determine such market power, courts commonly consider whether the defendant is able to force or to induce some potential tying-product customers (here potential Kodak parts customers) to purchase the tied product (here Kodak service) that these customers would not purchase absent the tying arrangement. *Jefferson Parish*, 466 U.S. at 12-18, 104 S.Ct. at 1558-61; *Mozart*, 833 F.2d at 1345; *Digidyne*, 734 F.2d at 1339-41. The district court did not decide this issue.

Appellants suggest that Kodak does have power in the parts market for two interdependent reasons. First, many Kodak parts are unique and available only from Kodak. *See Jefferson Parish*, 466 U.S. at 17, 104 S.Ct. at 1560 (explaining that a defendant may have market power if he offers a unique product that others are unable to offer). Second, owners of Kodak machinery cannot readily switch to other companies' machinery (thereby

obviating the need for Kodak parts). Once one owns Kodak's expensive machinery, appellants argue, he is locked in to it. *See Digidyne,* 734 F.2d at 1342 (discussing how market power can be enhanced by customer lock-in).

Kodak counters, first, that it does not have market power in the interbrand markets for copier or micrographic equipment.[3] Thus, Kodak argues, it cannot have market power in the after-market for spare parts. Kodak points out that appellants do not dispute that equipment purchasers consider the cost of parts and service when initially deciding between Kodak's equipment and its competitors' equipment. If Kodak were to charge supercompetitive prices for parts and service, equipment purchasers would buy competitors' equipment. Second, Kodak argues that appellants have failed to present sufficient evidence that its equipment owners cannot economically replace their current equipment.

We believe that competition in the interbrand markets might prevent Kodak from possessing power in the parts market. To be sure, this case is distinguishable from those in which the defendants had tied parts to equipment. In those cases, since equipment was the tying product, interbrand competition in the equipment market readily negated the plaintiffs' claims that the defendants

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[3] Kodak estimates its share of the micrographic market to be less than twenty percent. Kodak estimates its overall market share for plain paper copiers was less than two percent in 1984 and its current share of the high-volume segment of the copier market is approximately twenty-three percent. Appellants do not dispute Kodak's assertion that it lacks market power in the interbrand markets.

possessed power in the tying product market. *See, e.g., Grappone, Inc. v. Subaru of New England, Inc.,* 858 F.2d 792 (1st Cir. 1988) (tying of cars to parts). In this case, Kodak has tied parts to service, not equipment to parts. Interbrand competition in the equipment market does not in the abstract negate appellants' claim that Kodak has power in the parts market. *See Dimidowich,* 803 F.2d at 1480 n. 3 (pointing out that an owner of a broken piece of Bell and Howell micrographic equipment cannot turn to people who service only Kodak or 3M equipment).

But just as equipment purchasers would turn to one of Kodak's competitors if Kodak tied supercompetitively priced parts or service directly to equipment, equipment purchasers might turn to one of Kodak's competitors if Kodak ties supercompetitively priced service to parts. Kodak's desire to attract new customers might, therefore, keep it from charging supercompetitive prices for service. As we stated in a case involving a computer company's alleged tying of service and warranty protection to computer hardware, "To have attempted to impose significant pressure to buy [computer parts] by use of the tying service only would have hastened the date on which [defendant] surrendered to its competitors in the small business computer market." *Philips,* 699 F.2d at 977; *see also Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.,* 866 F.2d 228, 236 (7th Cir. 1988) (Posner, J. dissenting) (suggesting, in the context of a tie of parts to motors, that market forces will keep a company that lacks interbrand market power from charging supercompetitive prices in the parts market), *cert. denied,* ___ U.S. ___, 110 S.Ct. 141, 107 L.Ed.2d 100 (1989).

Nevertheless, we cannot uphold the district court's grant of summary judgment on this theoretical basis. Not only do we lack the benefit of the district court's consideration of the market power issue, we are presented with a record that was not fully developed through discovery on this issue.[4] Furthermore, market imperfections can keep economic theories about how consumers will act from mirroring reality. *See Jefferson Parish,* 466 U.S. at 15 n. 24, 104 S.Ct. at 1560 n. 24 (noting that market imperfections can keep consumers from seeing the price and quality implications of a tying arrangement). While appellants have not conducted a market analysis and pin-pointed specific imperfections in the copier and micrographic markets, a requirement that they do so in order to withstand summary judgment would elevate theory above reality. It is enough that appellants have presented evidence of actual events from which a reasonable trier of fact could conclude that Kodak has power in the interbrand market and that competition in the interbrand market does not, in reality, curb Kodak's power in the parts market. For example, appellants have presented evidence that Kodak charges up to twice as much as appellants for service that is of lower quality than appellants' service. Appellants presented evidence that in some

[4] The district court permitted only very limited discovery on the market power issue. Appellants requested further discovery in their opposition to Kodak's summary judgment motion. For example, appellants requested to depose two ISO customers who allegedly would not sign accurate statements concerning Kodak's market power in the parts market. Not finding it necessary to reach the market power issue in its decision, the district court, of course, had no reason to grant this request.

instances competition from ISOs drove down the price that Kodak was willing to charge for service and that in other instances some owners of large Kodak equipment packages will pay higher prices for Kodak service rather than switch to competitors' systems. *See Fortner,* 394 U.S. at 503-04, 89 S.Ct. at 1258-59 (a price differential may suggest market power).

Appellants' evidence distinguishes this case from *Philips*. In that case, involving a district court's proper summary judgment for a defendant on a tying claim based upon a lack of market power, we explicitly found that the plaintiff had "not presented facts from which [market power] could be inferred." *Philips,* 699 F.2d at 977. For example, in contrast to the situation in this case, it appeared uncontroverted that the higher price for the tied product was due to the product's greater reliability. *See Philips,* 699 F.2d at 969, 972-73, 977-78. The tied product did not go down in price after the tying arrangement ceased. *Id.* at 977.

There also appears to have been no evidence that Philips was the exclusive source of service for Philips computers, the tying product. But appellants have presented evidence that many Kodak parts, the tying product, are unique and available only from Kodak.

Furthermore, Philips' share of the interbrand computer market never exceeded five percent. *Id.* at 969. At the time of Philips' alleged tying arrangement, Philips' share of the interbrand market was declining as Philips' computers were "threatened . . . with obsolescence." *Id.* at 970. Roughly one year into the lawsuit, Philips withdrew completely from the American computer market. *Id.* at

969-70. By contrast, Kodak's share of the interbrand copier and micrographic equipment markets varies and may approach as much as twenty-three percent. *See ante* at 616, n. 3. Far from being threatened with obsolescence, Kodak's equipment is state of the art.

Granted, appellants have not claimed that these factors are sufficient to give Kodak power in its interbrand markets. But just as market share is not alone determinative of market power, *cf. Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1204 (9th Cir. 1975) (market share is not determinative of monopoly power), *cert. denied*, 425 U.S. 959, 96 S.Ct. 1741, 48 L.Ed.2d 204 (1976), power in the interbrand market is not the *only* basis for power in the parts market. Some strength in the interbrand market, although short of actual market power, can combine with other factors to yield power in an after-market. We, therefore, believe that the contrast between Kodak's and Philips' strength in their interbrand markets is another indication of a difference in power in their after-markets. *Cf. Sterling*, 866 F.2d at 236 (Posner, J., dissenting) (defendant's market share was one-tenth of one percent).

Viewed in the light most favorable to appellants, the evidence that they have presented is sufficient to raise a material issue of fact as to whether Kodak has power in the parts market.

Kodak also contends that it has legitimate business reasons for refusing to sell parts to equipment owners who use ISOs. This court has held that a tying arrangement "does not violate the antitrust laws 'if implemented for a legitimate business reason and if no less restrictive

alternative is available.' " *Mozart*, 833 F.2d at 1349 (citing *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 739 (9th Cir. 1981)). Kodak contends that it implemented its parts policies for three legitimate business reasons: (1) To guard against inadequate service, which reflects negatively on Kodak because customers cannot differentiate between bad service and bad equipment; (2) to remove inventory costs, which Kodak incurs in supplying replacement parts to non-users of Kodak service; (3) to prevent ISOs from free-riding on Kodak's investment in the copier and micrographic industry.

Appellants argue that Kodak's proffered reasons are pretextual or insufficient. Once again, the district court did not discuss this aspect of the case and we cannot say as a matter of law that Kodak's proffered reasons for its policies are genuine and sufficient. To prevail on the basis of its first reason, Kodak would have to prove[5] that its tying arrangement is the only way that highest quality service can be assured. *See id.* at 1350 & n. 7. But appellants have presented evidence that their service is superior to Kodak service. Furthermore, appellants have presented evidence from which a reasonable trier of fact could conclude that Kodak's first reason is pretextual. For example, appellants have presented evidence that Kodak for the first time refused to sell parts to appellant Image Technical Services, Inc. just two months after Image, in competitive bidding against Kodak, won contracts with

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[5] The defendant bears the burden of proving legitimate business reasons under Sections 1 of the Sherman Act. *Id.* at 1349.

the state of California. Triable issues of fact surround Kodak's first reason.

A reasonable trier of fact could also conclude that Kodak's second reason is pretextual. A reasonable trier of fact need not accept Kodak's assertion that not selling parts to equipment owners who use ISOs will reduce its inventory costs. A reasonable trier of fact could conclude that equipment owners' need for Kodak-supplied parts is determined only by the frequency of equipment failure. Indeed, Kodak's policy is based on the premise that equipment owners will have to buy replacement parts from Kodak, even if it means not using ISOs. Thus, triable issues of fact surround Kodak's second reason.

As a matter of law, Kodak's third reason cannot justify its policy. Kodak believes that if ISOs are to compete with it, they should be required to overcome the barriers to entering the parts market as well as the barriers to entering the service market. But one evil of a tying arrangement is precisely that it creates an entry barrier for potential competitors by requiring them to enter two product markets simultaneously. *Fortner*, 394 U.S. at 509, 89 S.Ct. at 1261. For this reason, "recovery of investment costs has been explicitly excluded from the narrowly-construed exceptions to the *per se* rule against tie-ins." *Digidyne*, 734 F.2d at 1343-44 (quoting *In re Data General Corp. Antitrust Litigation*, 490 F.Supp. 1089, 1122 (N.D.Cal. 1980). As a matter of law, therefore, it is a less restrictive alternative for Kodak to structure its prices for equipment, parts, and service so that the price for which Kodak sells each of these reflects Kodak's investment costs in that area. *Id.* at 1344 (citing *United States v. Jerrold Electronics Corp.*, 187 F.Supp. 545 (E.D.Pa. 1960), *aff'd per curiam*, 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806 (1961)).

Finally, Kodak suggests that it acted unilaterally in tying parts to service. It is true that independent action is not proscribed by Section 1 of the Sherman Act. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775 (1984). But Kodak entered into agreements with its equipment owners expressly set out in its "Terms of Sale," that it will sell parts only to users "who service only their own Kodak equipment." If such conduct were to be labelled "independent," virtually all tying arrangements would be beyond the reach of Section 1. We do not believe that *Monsanto*, without discussing the courts' tying decisions, meant to overturn them.

The district court improperly granted summary judgment on the Section 1 claim.

II. *The Refusal to Deal Claim*

Section 2 of the Sherman Act makes it illegal for any person to "monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2 (1982). For a person to be guilty of monopolization, he must (1) possess monopoly power in the relevant market; and (2) wilfully engage in conduct designed to maintain that power improperly. *See United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966). For a person to be guilty of attempted monopolization, he must (1) possess a specific intent to monopolize the relevant market with a dangerous probability of success; and (2) wilfully engage in conduct designed to

achieve monopoly power improperly. *California Computer Prod. v. IBM*, 613 F.2d 727, 736 (9th Cir.1979).[6] Appellants contend that they have presented genuine issues for trial as to whether Kodak has, in allegedly changing a long-standing policy of supplying Kodak parts to ISOs, engaged in improper monopolization or attempted monopolization conduct.[7]

The district court found that Kodak had no duty to deal with its competitors. We agree with the district court's statement of this general rule; however, we believe that there are material issues of fact concerning whether Kodak falls within one of the exceptions to it. A monopolist may not refuse to deal with a competitor in an exclusionary attempt to impede competition without a legitimate business reason. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608, 105 S.Ct. 2847, 2860, 86 L.Ed.2d 467 (1985); *Oahu Gas Service, Inc. v. Pacific Resources Inc.*, 838 F.2d 360, 368 (9th Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988). In the same spirit, a monopolist may not retaliate against a customer who is also a competitor by denying him access to a

[6] The cases also identify the standing requirement of "causal antitrust injury." *Id.* Kodak does not dispute appellants' standing to bring its Section 2 claim.

[7] Kodak contends that appellants did not raise this argument below. From reading only appellants' Memorandum in Opposition to Kodak's Motion for Summary Judgment, one can reach this conclusion. Certainly the focus of appellants' Section 2 claim has changed on appeal. But after reading all the papers surrounding Kodak's summary judgment motion, we are not confident enough that the district court did not consider appellants' present argument to foreclose appellants from raising that argument here.

facility essential to his operations, absent legitimate business justifications. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377, 93 S.Ct. 1022, 1029, 35 L.Ed.2d 359 (1973). Appellants have presented sufficient evidence, recounted above, from which a reasonable trier of fact could find that Kodak's implementation of its policies was anticompetitive, exclusionary, and involved a specific intent to monopolize. *Cf. Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332, 1339 (9th Cir.1983) (service contractor for distributor of money-handling machines produced no evidence that manufacturer who refused to sell contractor parts after manufacturer terminated distributor acted in a predatory manner or was not predominantly motivated by legitimate business purposes); *Bushie v. Stenocord Corp.*, 460 F.2d 116, 119-21 (9th Cir.1972) (distributor of dictating equipment produced no evidence that manufacturer who terminated him was motivated by anticompetitive intent).[8]

We have already discussed Kodak's proffered business justifications in our treatment of appellants' Section 1 claim. Although there is no least restrictive alternative requirement in the context of a Section 2 claim,[9] we noted

[8] The dissent implies that *Mozart* compels acceptance of Kodak's proffered quality control justification on Kodak's Section 2 claim. *See* Dissent at 624. However, *Mozart* merely held that substantial evidence supported a jury's determination that the defendant's proffered quality control justification was genuine, *Mozart*, 833 F.2d at 1350-51, 1352, despite the "skepticism" which "the quality control defense . . . usually has been accorded," *id.* at 1349.

[9] The plaintiff also bears the burden of proving lack of legitimate business justifications in a Section 2 claim. *Calculators Hawaii*, 724 F.2d at 1339.

above that there exist triable issues of fact as to whether Kodak's first two proffered reasons are genuine rather than pretextual. With respect to Kodak's third reason, we observed above that it was precisely the kind of justification the theory behind Section 1 negated. The same is true under Section 2. A claim that one need not support a competitor's activities is merely a claim that one has no duty to deal with that competitor. Such a claim cannot serve as a justification for conduct which has been found to be exempted from this general rule.[10]

We have more trouble with the monopoly power (or dangerous probability of monopoly power) issue. The district court did not discuss whether the service of Kodak equipment could be a relevant market and whether Kodak might possess monopoly power or a dangerous possibility of monopoly power in that market. This court has strongly suggested that service of one company's micrographic equipment can be a relevant market under Section 2. *See Dimidowich*, 803 F.2d at 1480-81 n. 3 ("[A]n owner of broken [Bell & Howell] micrographic equipment is indifferent to people who can service Kodak or 3M machines. If the owner's only option is to request service from Bell & Howell or Comgraphix

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[10] We stress that there exists a triable issue of fact as to whether Kodak has *any* non-pretextual legitimate business reason for its conduct. We do not suggest, as the dissent contends, "that because the quality control defense failed under section 1, it must also fail under section 2." Dissent at 624. Likewise, the dissent's argument that the law allows a defendant to overcome a section 2 claim when he has acted in part out of a desire to exclude competition and in part for a legitimate business reason is beside the point.

(depending on his location), that is obviously the market the owner faces."); *Cf. Bushie*, 460 F.2d at 118 n. 1, 120-21 (implying without analysis that the relevant market for servicing dictating equipment is the interbrand service market). We cannot say as a matter of law that service of Kodak equipment is not the relevant market in this case.

Assuming such a market, might Kodak have monopoly power in it? Monopoly power is the "power to control prices or exclude competition" in the relevant market. *United States v. E.I. DuPont DeNemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956). It is something more than the market power that is a prerequisite to liability under Section 1. *See Digidyne*, 734 F.2d at 1339-41. The question whether appellants have presented sufficient evidence on this issue is thus not as easily answered as the question whether they have presented sufficient evidence on market power. We conclude that the evidence presented by appellants is sufficient to withstand summary judgment. Again, there is logical appeal in Kodak's theory that it could not have monopoly power (let alone market power) in the service market since it lacks economic power in the interbrand markets. But in light of appellants' evidence we cannot say that this theory mirrors reality.

The district court improperly granted summary judgment on the Section 2 claim.

The judgment of the district court is REVERSED and the case is REMANDED.

WALLACE, Circuit Judge, dissenting:

I cannot agree with the conclusions reached by the majority. I would affirm the judgment of the district court on both the tying and the attempted monopolization claims. On the first claim, Image Technical Services (Image Tech) has failed to raise any genuine issues of material fact with regard to Kodak's market power in the market for replacement parts. On the second claim, the record shows that Kodak has a legitimate business reason for its allegedly monopolistic behavior. Therefore, summary judgment was proper on both claims.

I

I agree with the majority that Image Tech has raised triable issues as to whether Kodak's business practices constitute a tying arrangement. However, not all ties are proscribed by the antitrust laws. Rather, to establish a violation of section 1 of the Sherman Act, Image Tech must show that Kodak possesses sufficient power in the market for the tying product (parts) to appreciably restrain competition in the market for the tied product (service).

Image Tech does not contest that Kodak lacks market power in the interbrand market for copiers. Further, it is uncontested that purchasers of copiers consider costs of maintenance and repair in deciding which brand to buy. Therefore, I do not see how Kodak could have any market power in the market for replacement parts. If Kodak attempts to increase the price of replacement parts above the competitive level, new buyers will increase their estimates of the total price (including parts and service) of a

Kodak copier. If some current Kodak owners are unwilling to scrap their copiers and buy new ones from other manufacturers, Kodak will gain short-run profits from the sale of parts. However, as new buyers switch brands, Kodak will lose market share in the sales of new copiers, to its long-term disadvantage.

I find persuasive Judge Posner's reasoning in the closely analogous case of *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228 (7th Cir.1988) (Posner, J., dissenting) (*Sterling*). In that case, Sterling tied replacement parts to purchases of new Sterling motors. The majority did not reach the question of the legality of the tie. Judge Posner did so, and concluded that Sterling's lack of power in the interbrand market for motors precluded a finding of market power in the derivative market for replacement parts:

> [Plaintiff] argues that Sterling has a monopoly of replacement parts *for Sterling motors*. This is true in the trivial sense that only Sterling manufactures parts usable in those motors. But it would be absurd to infer from this . . . that Sterling has market power, that is, power to raise the price of its parts above the price that a competitive market would charge, without losing so many sales as to make the price increase unprofitable. . . . Sterling could in principle exploit its "monopoly" by setting its price for replacement parts just below the point at which owners of Sterling motors would decide to scrap the motors rather than pay an exorbitant price for the parts necessary to keep them in service. But this would be a short-run game, since as soon as word got out no one would buy Sterling motors.

Id. at 236 (Posner, J., dissenting).

We accepted a similar argument in *General Business Systems v. North American Philips Co.*, 699 F.2d 965 (9th Cir.1983) (*General Business Systems*). There, Philips, a computer manufacturer, was accused of illegally tying service and warranty protection (the tying service) to parts (the tied product). Philips lacked market power in the primary interbrand small business computer market. We held that as a result, Philips could not have had any market power in the derivative markets for service and warranty protection. In affirming summary judgment for Philips, we stated: "To have attempted to impose significant pressure to buy [the tied product] by use of the tying service only would have hastened the date on which Philips surrendered to its competitors in the small business computer market." *Id.* at 977.

The majority acknowledges the force of this reasoning, but finds that it is too "theoretical" to serve as a basis for summary judgment. Maj. op. at 616-17. The majority's principal argument is that Image Tech has presented evidence suggesting that Kodak is exercising market power in the parts market. Moreover, the majority observes that the district court allowed only incomplete discovery on this issue, so that summary judgment would be inappropriate given the underdeveloped record.[1]

[1] The majority also suggests that the theory outlined in *Sterling* and *General Business Systems* may not reflect the reality in this case because of "market imperfections." No evidence of market imperfections has been presented, and the majority does not identify any specific imperfections which might invalidate the theory.

I think the majority has misconstrued the nature of Kodak's argument. Applying Judge Posner's analysis in *Sterling*, competition in the interbrand market dictates a simple choice: Kodak may either price parts competitively and maintain its interbrand market share, or it may price parts supercompetitively – yielding a short-term gain but over the long term destroying its share of the interbrand market. In either case Kodak is not harming competition: if it adopts the latter strategy, competitive forces will exact a heavy toll in the interbrand market, and profits gained from the short-term parts mark-ups will quickly be eclipsed. The result would be "a brief perturbation in competitive conditions – not the sort of thing the antitrust laws do or should worry about." *Sterling*, 866 F.2d at 236 (Posner, J., dissenting).

That Image Tech presents some evidence suggesting that Kodak is not pricing parts competitively, or that Image Tech might be able to do so given additional discovery, should not be sufficient to defeat summary judgment. At best, this would be evidence that Kodak is pursuing a self-destructive pricing strategy which lacks long-term effects upon competition. It is not evidence of true market power. Rather, because lack of power in the interbrand market *necessarily* precludes power in the derivative market, Image Tech must raise allegations that Kodak has interbrand market power. No amount of evidence of pricing in the derivative market can overcome this requirement.

The majority attempts to distinguish *General Business Systems* on its facts. The majority correctly points out that in *General Business Systems*, there was some factual evidence supporting a finding that Philips lacked market

power in the derivative market: the higher price for the tied product was attributable to the product's greater reliability, and Philips was not the exclusive source of the tying product. *General Business Systems*, 699 F.2d at 977-78. However, we did not indicate that such evidence was necessary to the holding. Rather, we were persuaded by the theoretical argument – which the majority declines to accept – that any attempt to exercise power in the tying market would prove fatal in the long run; we then pointed out the factual evidence as additional support for our conclusion. *See id.* at 977.

I am puzzled by the majority's argument that *General Business Systems* is also distinguishable because Kodak has a 25 percent share of the interbrand market, whereas Philip's share was small and declining. Maj. op. at 616. The majority does not suggest why this provides a meaningful distinction. Image Tech concedes that Kodak lacks interbrand market power. Therefore, the majority's holding is tenable only if power in the interbrand market is not relevant to power in the derivative market. I cannot see how the magnitude of Kodak's interbrand market share – once it is conceded that it does not amount to market power – is relevant to any theory of this case. Although the majority states that Kodak's market share, when combined with (unspecified) "other factors," could produce power in the derivative market, maj. op. at 618, no analysis is provided to support this contention.

General Business Systems cannot be so readily distinguished. Nor can the economic logic of Kodak's position be overcome. The majority purports to reject reliance upon theoretical bases in considering the tying claim. However, a theoretical question is necessarily presented:

is it possible to have power in the derivative market for replacement parts without possessing power in the primary interbrand market for copiers? The majority answers in the affirmative. However, it does so without analysis or explanation, and without argument from economic principles or legal precedents. In essence, the majority simply ignores the reasoning of *General Business Systems* and Judge Posner's opinion in *Sterling*. No one – neither Image Tech nor the majority – offers a reason why these analyses should be disregarded.

Because I am convinced that power in the primary interbrand market is a prerequisite to power in the derivative market for replacement parts, I conclude that market power has not been demonstrated and would affirm the summary judgment on the section 1 claim.

II

I also believe that summary judgment was appropriate on the attempt-to-monopolize claim under section 2 of the Sherman Act. Kodak's policies cannot give rise to section 2 liability if they have a legitimate business justification. *Oahu Gas Service, Inc. v. Pacific Resources Inc.*, 838 F.2d 360, 368 (9th Cir.) (*Oahu Gas*), *cert. denied*, ___ U.S. ___, 109 S.Ct., 180, 102 L.Ed.2d 149 (1988); *see Aspen Skiing Co. v. Aspen Highlands Skiing Co.*, 472 U.S. 585, 608, 105 S.Ct. 2847, 2860, 86 L.Ed.2d 467 (1985). The burden of proof is on the plaintiff to show that there is no such legitimate justification. *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332, 1339 (9th Cir.1983).

Kodak submitted extensive and undisputed evidence of a marketing strategy based on high-quality service.

Kodak alleges that independent service organizations (ISOs) such as Image Tech may provide low-quality service, which will reflect negatively on Kodak and undermine its quality-of-service strategy. According to Kodak, the tying of replacement parts to service is used to police against poor-quality service by the ISOs. To defeat a motion for summary judgment, Image Tech, as the party with the burden of proof, was required to present evidence to refute these allegations. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). It failed to do so.

In *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342, 1350-51, 1352 (9th Cir.1987) (*Mozart*), *cert. denied*, ___ U.S. ___, 109 S.Ct. 179, 102 L.Ed.2d 148 (1988), we held that an almost identical argument was sufficient to defeat liability under section 2. There, Mercedes based its reputation in part on the quality of its replacement parts. Mercedes refused to supply dealers with new cars unless the dealer purchased parts from Mercedes, *Id.* at 1344, 1351. Mercedes argued that this policy was used to maintain the high quality of replacement parts. We held that this tying arrangement was permissible due to the legitimate business justification of quality control. *Id.* at 1351, 1352; *see also Drinkwine v. Federated Publications, Inc.*, 780 F.2d 735, 740 (9th Cir.) ("desire to control quality" held a legitimate business justification for a tying arrangement sufficient to support summary judgment on a section 2 claim), *cert. denied*, 475 U.S. 1087, 106 S.Ct. 1471, 89 L.Ed.2d 727 (1986).

Image Tech argues, and the majority agrees, that summary judgment is not appropriate because Kodak's policies may in part be motivated by a desire to exclude

the ISOs. However, the mere presence of monopolistic motivations is insufficient to establish liability. "Where a monopolist's [activity] is based partially on a desire to restrict competition, we determine antitrust liability by asking whether there was a legitimate business justification for the monopolist's conduct. . . . [T]he desire to maintain market power – even a monopolists' market power – cannot create antitrust liability if there was a legitimate business justification for [the challenged action]." *Oahu Gas*, 838 F.2d at 368-69.

Image Tech also argues that Kodak's proposed justification is insufficient because strategies are available to accomplish the same objectives that pose a lesser injury to competition. A defendant's proposed business rationale cannot serve as a defense to a *section 1* tying claim unless the challenged practice is the least restrictive alternative for achieving the stated goal. *Mozart*, 833 F.2d at 1349. Thus, the majority rightly rejects Kodak's use of the quality-control defense in the context of the section 1 claim. Maj. op. at 618. However, no such requirement exists under section 2. *Any* business justification – whether or not it is the least restrictive – will defeat an attempt-to-monopolize claim. *Oahu Gas*, 838 F.2d at 368-69 (A monopolist's duties under section 2 "arise only when there is *no* justification for refusing to aid a competitor." (emphasis added)); *see also Mozart*, 833 F.2d at 1352. Thus, the majority's suggestion – that because the quality-control defense failed under section 1, it must also fail under section 2 – misconstrues the section 2 test. There is no less-restrictive alternative requirement here.

Image Tech has raised no genuine issue of material fact showing Kodak's policy to be unsupported by legitimate business judgment. While the policy may not be the least restrictive alternative, and while it may also involve in part a desire to enhance Kodak's market share in service, such circumstances are insufficient to establish liability under section 2. I would affirm the summary judgment on this claim as well.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IMAGE TECHNICAL SERVICES, INC., et al.,	)	NO. C-87-1686-WWS
Plaintiffs,	)	MEMORANDUM OF OPINION AND ORDER
v.	)	
EASTMAN KODAK COMPANY,	)	(Filed
Defendant.	)	Apr 18, 1988)

The eighteen plaintiffs in this action are independent service organizations ("ISO's") engaged in repairing and servicing defendant Eastman Kodak Company's copiers and micrographic equipment, and in buying, reconditioning and selling used Kodak copiers and micrographic equipment. They alleged that Kodak has violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Section 3 of the Clayton Act, 15 U.S.C. § 14, as well as state laws, by restricting the sale of replacement parts to direct Kodak equipment customers and by refusing to sell service contracts on used equipment unless it is first inspected and brought up to standard by Kodak.

Kodak has moved for summary judgment on the ground that the policies and practices complained of, as to which there is no material dispute, do not as a matter of law violate federal antitrust laws.[1]

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[1] The parties have filed 120 pages of briefs and voluminous supplementary material. Regrettably this occurred because the opening brief was filed during the absence of the

(Continued on following page)

The Materials Facts

Kodak manufactures and markets a line of copier-duplicators under the trade name "Ektaprint." It also manufactures and markets business imaging equipment, such as microfilmers and reader-printers. Kodak provides after-sale service for these products.

With respect to copier-duplicators, Kodak has since 1975 not knowingly sold parts to anyone other than direct purchasers of that equipment. Plaintiffs contend that there may have been exceptions to this policy and that it was not put in writing until 1985. However, there is no material dispute concerning the existence of the practice.

Since 1985, Kodak has also sold imaging equipment parts only to purchasers of such equipment, with certain qualifications not material here.

The effect of these practices is to generally bar sales of parts required to repair and maintain Kodak copiers and imaging equipment to plaintiffs and other ISO's.

Kodak also sells equipment maintenance agreements on copiers and imaging machines. It only sells such agreements on used equipment if it first inspects the

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(Continued from previous page)

assigned judge who would not have permitted it. Because the briefs escaped the discipline imposed by the Court's 25 page limitation, they are verbose, disorganized, repetitive, overly argumentative and replete with immaterial matter, unnecessarily increasing the Court's burden. Counsel could have presented their case far more effectively if they had taken the trouble to write concise briefs directed to the issues.

equipment and brings it up to basic performance standards at the customer's expense. Thus purchasers of used equipment from ISO's who want to purchase a maintenance agreement from Kodak must first submit the equipment to Kodak for inspection and any necessary upgrading.

Discussion

The Section 1 Claim

Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits "[e]very contract, combination . . . or conspiracy in restraint of trade." "Essential to every § 1 offense is concert of action between separate business entities. It is axiomatic that unilateral activity by a single firm cannot be reached with this section." *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 286 (5th Cir. 1978).

Plaintiffs' complaint alleges that Kodak has entered into conspiracies with original equipment manufacturers to prevent them from providing parts for Kodak equipment to plaintiff, with owners of Kodak equipment to prevent them from selling parts to plaintiffs, with organizations that repair Kodak equipment to refuse to deal with plaintiffs, and with entities providing financing for the purchase of Kodak equipment to cause them to require Kodak repair and service as a condition of financing.

In their opposition to the motion, however, plaintiffs make no effort to support any of these allegations. They have produced two declarations in which the declarants state Kodak suppliers refused to sell them Kodak parts

because of "arrangements with Kodak" or because the parts were "proprietary" to Kodak. But these statements are hearsay and do not satisfy plaintiffs' burden under Rule 56(e) to come forward with admissible evidence showing the existence of a genuine issue. *See Celotex v. Catrett*, 477 U.S. 317 (1986).[2] Moreover, any arrangement between Kodak and its parts suppliers under which the suppliers sell Kodak parts exclusively to Kodak without more would not sustain an inference of a Section 1 conspiracy. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-95 (1986). Plaintiffs' discussion of the conspiracy cases is therefore wholly academic. Pltfs. Opp. at 48-50.[3]

Aside from having come forward with no evidence to support a finding of an unlawful agreement, plaintiffs have not demonstrated the existence of a tying arrangement. A tying arrangement is "an agreement by a party to sell one produce but only on the condition that the buyer also purchase a different (or tied) product, or at least agree that he will not purchase that product from any other supplier." *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958) (footnote omitted).

There is no evidence of any such arrangement in this case. In selling its copiers and imaging equipment, Kodak does not require the buyer to agree to purchase parts or service from Kodak. Nor does it condition the sale of one

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[2] Plaintiffs make no claim that further discovery would enable them to produce facts showing a conspiracy. *See infra*, pp. 8-10.

[3] In the absence of an agreement, the claim under Section 3 of the Clayton Act must fail.

product on the buyer's purchase of another product. *See Dimidowich v. Bell & Howell*, 590 F. Supp. 45, 49 (E.D. Cal. (1984), *aff'd in relevant part*, 803 F.2d 1473 (9th Cir. 1986), *modified*, 810 F.2d 1517 (1987). A Kodak customer can buy equipment without having to buy parts; and he can buy part if he simply owns Kodak equipment. He can buy a Kodak maintenance agreement so long as his equipment qualifies, *i.e.*, so long as Kodak has found that it is in satisfactory condition or, if not, has brought it up to satisfactory condition. *Compare Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1343, 1344 (9th Cir. 1987) (Mercedes franchisee required to deal exclusively in Mercedes parts).

The fact that Kodak refused to sell parts to plaintiffs and other ISO's does not violate Section 1. The right of a manufacturer unilaterally to select its customers and to refuse to sell to others is well-established, regardless of the possible adverse effect on would-be customers. *Bushie v. Stenocord Corporation*, 460 F.2d 116, 119 (9th Cir. 1972); *Calculators Hawaii, Inc. v. Brandt, Inc.*, 724 F.2d 1332 (1983); *see Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 n.27 (1985). *Compare Dimidowich*, 803 F.2d at 1479 (where there was evidence of a concerted refusal to deal).

This case must be distinguished from *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), on which plaintiffs rely. That case held invalid under Section 1 a tying arrangement under which Data General refused to license its copyrighted RDOS operating system for use with certain computer processing units unless the licenses also purchased those processing units from Data

General. Competing manufacturers of emulating processing units complained of having been excluded from the market. The court held that the desirability of Data General's RDOS, including the fact that it was copyrighted, gave Data General sufficient power in the relevant market to force buyers to buy processing units from Data General rather than from competing manufacturers.

Contrary to plaintiffs' argument, *Digidyne* did not establish a "lock in" theory. The Court held that the tying power of the RDOS system was only enhanced by the fact that customers were "locked in" to the use of RDOS. Purchasers of the RDOS operating system, who were primarily original equipment manufacturers, were "locked in" because they had to develop and install application software compatible with RDOS for their processing units. Once developed at substantial expense, it became uneconomical for manufacturers to abandon the application software for future production in order to change to another operating system.

All that *Digidyne* illustrates is the existence of a continuing tying arrangement, the effectiveness of which was enhanced because the initial investment in compatible application software gave customers an economic incentive to continue buying Data General's processing units. The case has nothing to do with the present situation in which customers who have purchased Kodak equipment in a competitive market will tend to retain that equipment for its economic life.

The Section 2 Claim

Plaintiffs contend that Kodak violated § 2 by leveraging monopoly power in one market to gain competitive

advantage in another. *Berkey Photo Co. v. Eastman Kodak Co.*, 603 F.2d 263, 275-76 (2d Cir. 1979); *but see Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1346-47 (9th Cir. 1986) (leveraging theory not adopted in Ninth Circuit). The argument, even if legally valid in this circuit, lacks any factual support.

Plaintiffs do not contend Kodak possesses monopoly power in the new equipment market in which it competes with Xerox, IBM, Bell and Howell, 3M, and various Japanese manufacturers and holds no significant share.

Plaintiffs contend that Kodak has a dominant share of a purported market for servicing Kodak copiers and micrographic equipment. Assuming without deciding that such a market can be found to exist and that Kodak has market power in it, plaintiffs have not come forward with any facts to suggest that Kodak has attempted to leverage power in that market to gain competitive advantage in another market. *See* Pltfs. Opp. at 50-52.

Kodak has, of course, a natural monopoly over the market for parts it sells under its name but that imposes no duty on it to sell to plaintiffs. *See Olympia Equip. Leasing v. Western Union Telegraph*, 797 F.2d 370, 375 (7th Cir. 1986) ("a firm with lawful monopoly power has no general duty to help its competitors.") *Compare Aspen Skiing Co. v. Aspen Highlands Skiing Corp., supra* (dominant seller monopolized market by terminating joint arrangement with competitor). Kodak's unilateral refusal to sell its parts to plaintiffs does not violate Section 2. *Bushie*, 460 F.2d at 120.

Discovery

Kodak's motion for summary judgment was filed on August 19, 1987. On September 11, 1987, a status conference was held following which the Court issued an order that (1) deferred briefing and hearing on the motion for summary judgment until after completion of plaintiffs' discovery, and (2) made the following provisions for discovery:

> 2. On or before September 25, 1987 plaintiff shall file and serve on defendant one set of interrogatories . . . [and]
>
> 3. . . . one set of requests for production of documents pertaining to the issues raised by and material to defendant's summary judgment motion.
>
> 4. On or before September 25, 1987, plaintiff shall file and serve on defendant notices of no more than four depositions of persons with knowledge pertaining to the issues raised by and material to defendant's summary judgment motion.
>
> 5. Except by leave of Court, plaintiff shall not at this time take any discovery other than that outlined in Paragraphs 2, 3 and 4 above. Upon completion of this discovery, plaintiff may, if it so desires, seek leave of Court to take additional discovery pertaining to defendant's pending summary judgment motion.

In response to plaintiff's request, on January 4, 1988, the Court entered a further order stating:

> 2. Without altering the above-described briefing schedule, plaintiffs shall be given the opportunity to take the depositions of no more than two additional deponents who can provide

> testimony regarding the issue of market power raised in defendant's motion for summary judgment.
>
> 3. Without altering the above-described briefing schedule, defendant will, upon specific requests by plaintiffs, provide plaintiffs with the source, author and/or date, if ascertainable, of any documents already produced to plaintiffs by defendant.
>
> 4. In connection with their response to defendant's motion for summary judgment, plaintiffs may move this Court, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, for the opportunity to obtain further discovery relevant to the issues raised by and material to defendant's summary judgment motion. Any request for additional discovery should be accompanied by an explanation of the relevance of the requested information to the issues raised by and material to defendant's motion for summary judgment.

No further requests for discovery were made by plaintiffs until the filing of their opposition memorandum to this motion. For the first time, they invoke Rule 56(f), but without specifying the nature or subject matter of the additional discovery sought. Pltfs. Opp. at 52-54. In this accompanying declaration, plaintiffs' counsel states that discovery has been limited but only as to "the important issues in the marketplace with regard to: 1) relevant market; 2) market power; and competitive injury." Decl. of Hennefer at 4, para. 18. Counsel does not disclose what additional discovery may be needed or how it may help plaintiffs cure the fatal deficiencies in their case.

The material issue in this motion is the lawfulness of Kodak's business policies and practices. Plaintiffs' counsel does not claim that these policies and practices are not well known to plaintiffs or that there are material factual disputes concerning them. Nor is it explained how additional discovery could affect the determination of lawfulness.

Nor does plaintiffs' counsel stated that additional discovery is necessary or desired on the issue of conspiracy, and he has never sought such discovery. The motion for summary judgment is therefore appropriate for decision on the present state of the record. *See Caravan Mobile Home Sales, Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, 769 F.2d 561, 564 (9th Cir. 1985); *In re Airport Car Rental Antitrust Litigation*, 766 F.2d 1292 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 2248 (1986); *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 297-98 (1968).

Conclusion

For the reasons stated, plaintiffs' claims under the federal antitrust laws are dismissed. Plaintiffs' pendent state law claims are dismissed for lack of subject matter jurisdiction.

IT IS SO ORDERED.

DATED: April 15, 1988

/s/ William W Schwarzer
WILLIAM W SCHWARZER
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IMAGE TECHNICAL SERVICE, INC., a California corporation; J-E-S-P COMPANY, Inc., a New Jersey corporation; SHIELDS BUSINESS MACHINES, INC., a Pennsylvania corporation; MICROGRAPHIC SERVICES, INC., a Missouri corporation; MICRO MAINTENANCE, INC., an Illinois corporation; ATLANTA GENERAL MICROFILM CO., INC., a Georgia corporation; ROGER KATONA, doing business as G. & S. Electronics; AMTECH EQUIPMENT MAINTENANCE, INC., a Minnesota corporation; ADVANCED SYSTEMS SERVICES, INC., a Colorado corporation; B.C.S. TECHNICAL Services, Inc., a Colorado corporation; BOB INGLE, INC., a Missouri corporation; DATA PROX EQUIPMENT CO., a New Jersey corporation; FISHER MICROGRAPHICS, INC., a Missouri corporation; I.O.A. DATA CORP., a New York corporation; SEARLE ENTERPRISES, doing business as Micro Image, Inc.; MIDWEST MICROFILM EQUIPMENT & SERVICE, INC., a Minnesota corporation; OMIN MICROGRAPHIC SERVICES, INC.; and CPO, LTD., a California corporation, Plaintiffs-Appellants, v. EASTMAN KODAK CO., a New Jersey corporation, Defendant-Appellee.	No. 88-2686 D.C. No. CV-87-1686-WWS ORDER (FILED SEP 21 1990)

Before: CHAMBERS, WALLACE, and WIGGINS, Circuit Judges

The panel has voted to deny the petition for rehearing. Judge Wiggins votes to reject the suggestion for rehearing en banc. Judge Wallace votes to grant the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.)

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708.)

LIST OF PENDING CASES RAISING IDENTICAL *PER SE* TYING AND MONOPOLIZATION CLAIMS IN SINGLE BRAND AFTERMARKETS

FIRST CIRCUIT

Picker International, Inc. v. Bruce Leavitt, Imaging Equipment Services, Inc. and Thomas J. Quinn, Nos. 87-2828WF, 87-2597 (D. Mass. filed 1987).

Data General Corp. v. Grumman Systems Support Corp., No. 88-0033-S (D. Mass. filed 1988).

Computer Products & Repair, Inc. v. Data General Corp., et al. Civ. Action 89-0357S (D. Mass. filed Feb. 16, 1989).

THIRD CIRCUIT

Allen-Myland, Inc. v. International Business Machines Corp., 693 F. Supp. 262, 1988 Trade Cases (E.D. Pa. 1988); 746 F. Supp. 520 (E.D. Pa. 1990).

FOURTH CIRCUIT

Abcor Corp. v. AM International, Inc., 916 F.2d 924 (1990).

Service & Training, Inc. v. Data General Corp., 737 F. Supp. 334 (D. Md. 1990).

FIFTH CIRCUIT

Electronics in Medicine, Inc. v. Picker International, Inc., No. H-88-1400 (S.D. Texas filed 1988).

SIXTH CIRCUIT

Virtual Maintenance, Inc. v. Prime Computer, Inc., No. 89 CV 71762 DT (E.D. Mich.) (Judgment entered Nov. 15, 1990), *appeal filed*, No. 90-2249 (6th Cir. filed Nov. 16, 1990).

HyPoint Technology, Inc. v. Hewlett-Packard Co., No. C 87-2484 (N.D. Ohio 1987); *appeal filed*, No. 90-3526 (6th Cir. filed June 1, 1990).

EIGHTH CIRCUIT

Financial Prods. Corp. v. Unisys Corp., No. 90-0-143 (D. Neb. filed March 8, 1990).

NINTH CIRCUIT

Datagate, Inc. v. Hewlett-Packard Co., 1989-2 Trade Cases (CCH) ¶68,786 (N.D. Cal. 1988), *appeal filed*, No. 88-15293 (9th Cir. filed Sept. 9, 1988).

TENTH CIRCUIT

Systemcare, Inc. v. Wang Laboratories, Inc., No. 89-B-1778 (D. Colo. filed March 8, 1990).